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ISSUE

DID THE JUDGE ERR WHEN HE FOUND THAT RESPONDENT VIOLATED SECTION 8(a)(1) BY DISCHARGING LINDA COOPERMAN BECAUSE SHE REFUSED TO COMMIT AN UNFAIR LABOR PRACTICE

STATEMENT OF THE CASE

Respondent The Lorge School ("Lorge" or "the School"), located on West 17th Street in Manhattan, is an ungraded, non-public school for children in grades kindergarten through twelve who have emotional and learning disabilities. 99% of the students come from families who live close to the poverty line. (Transcript page (T.) 112) and virtually all the School's funding comes from the State of New York. (T. 8,9, 22, 23) There are around 100 non-resident students in the School. (T. 24)

The School terminated Linda Cooperman from her position as Instructional Supervisor on August 1, 2006, three weeks after her employment began. Upon a charge filed by Cooperman, the General Counsel issued a Complaint and Notice of Hearing alleging that Lorge violated Section 8(a)(1) of the National Relations Labor Act (NLRA) by discharging Cooperman because she refused to create a "hostile work environment" for classroom teacher Christopher Piccigallo and music teacher James Rouse, the Union chapter leader and Union delegate, respectively.¹

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¹The United Federation of Teachers ("Union") was certified as the collective bargaining agent for Respondent's teachers and employees in 2000, but did not represent Cooperman, an admitted supervisor. The current CBA is effective from July 1, 2005 to June 30, 2008. The contracts were negotiated without a strike or lockout and many grievances have been resolved informally between the parties.

Following a hearing held on May 30, May 31, June 1 and June 13, 2007, the Administrative Law Judge issued a Decision finding that Respondent violated Section 8(a)(1) of the Act by discharging Linda Cooperman because of her refusal to assist in causing the resignation or constructive discharges of Rouse and Piccigallo because of their activities as union representatives.

STATEMENT OF FACTS²

As the ALJ noted in his decision, the events here took place just weeks after a new management team was in place at the School. Deborah Kasner, who had worked at Lorge since 1996 as a social worker, Clinical Supervisor in charge of social workers and Contract Administrator, had just been appointed Executive Director. (T. 21, 26) David Osman had been hired in her place as Clinical Supervisor and Instructional Supervisor Dr. Elaine Dawes was retiring. (T. 21)

In addition, Lorge had recently undergone a quality assurance review by the New York State Department of Education. The Department had issued a very critical and "potentially horrendous" report ("State Report") notifying Lorge that the School was out of compliance with some State educational standards. (T. 35-37, 44)

Into this situation, on July 10, came Linda Cooperman, a teacher who had left her most recent job because of problems she had with her supervisor (T. 575), who had no experience in private school and little experience with student populations with behavior disorders (T. 30-31), and who had applied for the job of Executive Director at Lorge, but had been rejected in favor of Kasner, someone who Cooperman thought did not have

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² The following are the facts that are as found by the Administrative Law Judge or are undisputed, except as otherwise indicated.

licensure equivalent to her own; Linda Cooperman, who was described by a number of witnesses as hostile, abrasive and condescending. (T. 597) She came in with the view that she had a mandate from the Board to "fix the school" and that she was going to do it and do it her way. She immediately criticized her predecessor Dr. Dawes, stating that Dawes did not have high enough expectations for the students and that she (Cooperman) wanted to improve learning levels. (T. 37, 215-216) There was a clash of the roles of Kasner as the Executive Director and Cooperman as someone under her supervision, given that Cooperman had a school administrator's license and Kasner did not.

By many accounts, Cooperman's approach when she came into the school was to move very quickly to implement the changes she thought were necessary, in particular her plans for departmentalization, despite a caution from the Board Chair that changes should be implemented slowly (T. 213-214, 585) and despite the objections to her plans from the Instructional Supervisor whom she was succeeding (T. 45) (Cooperman herself testified that Kasner had told her that Dawes had complained about some of the changes Cooperman wanted to make (T. 206, 236)), Clinical Supervisor David Osman, Dean Shawn Bradley, Assistant Dean Cassandra Pierre, and, most significantly, objections from her supervisor, Deborah Kasner. (T. 45, 52, 105, 120) Indeed, Cooperman told Kasner that she could <u>only</u> supervise teachers if they were departmentalized. (T. 44, 120) Osman recalls Cooperman stating that she received a directive to change the school and if the directive wasn't followed, the school would be shut down (T. 511, 538) During her tenure, Cooperman made no effort to get to know the students at the school.³ (T. 54, 55)

³ Cooperman reached these hasty conclusions notwithstanding her lack of experience with students with behavior disorders and mental health issues. (T. 599)

It is undisputed in the record as set forth below that Kasner learned in the few weeks after Cooperman arrived that Cooperman had alienated many of her colleagues in the brief time she was at the school.

• Elaine Dawes, who had a decorate in Education (and who was, at the time of the hearing, a former employee with no personal incentive to dissemble), told Kasner after Cooperman's first week on the job that she found Cooperman sarcastic, hostile, argumentative and unreceptive to feedback; that she felt insulted by the way Ms. Cooperman spoke to her; and that Ms. Cooperman acted like a know-it-all who gave Dawes the feeling that everything she had done in the school in the past five years was irrelevant and unsatisfactory and that Cooperman had been called in to save the day. She found Cooperman to be very critical (she cited a comment by Cooperman that a teacher "sounded like a streetwalker"), she did not like the way Cooperman spoke to students and she could not even bear being in the same room with Mrs. Cooperman. (T. 38, 43, 218, 415-423, 597-8) (Kasner testified that after Cooperman left, Dawes had also told her that Cooperman had told her, in a statement of amazing insensitivity and hostility, that "[Dawes'] children only got into Harvard because they [are] African-American." (T. 40) While this statement (which was not denied by Cooperman) did not enter into Kasner's decision to discharge Cooperman, there could not be a clearer example of why Cooperman had difficulty getting along with other people at the School. (T. 38-43, 218,

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⁴ Hearsay testimony discussed in this brief was not taken for the truth of the matter asserted. (T. 598) When Dawes was asked at the hearing about this accusation, she said she did "not want to get into it." Dr. Dawes told Kasner about the racially discriminatory comment after Cooperman was fired. It is offered here merely to show the racial insensitivity of one whose job was to educate minority children. Anyone who has the propensity to make such comments clearly lacks the ability to function in the job for which she was hired.

415, 418, 598)⁵ Cooperman testified that she had had a conflict with Dr. Dawes over the validity of a particular educational program (T. 235), but in a demonstrable evidence of her lack of perception, Cooperman testified that she found her relationship with Dawes otherwise to be "fine." (T. 238)

- Vilencia Edwards, a teacher at the school, told Kasner soon after Cooperman arrived that she found her to be very harsh and not interested in hearing the feedback of people who had been in the school for long periods of time, like herself. She thought it was going to be a very difficult year. (T. 599)
- Dean Shawn Bradley said that he didn't think it would work out. He expressed to Kasner a lot of concern about Cooperman's plans for departmentalization because of students transitioning every period. It would have been Bradley's responsibility to handle the behavioral issues that would arise from that, and he was extremely concerned and extremely distressed that when he attempted to discuss this with Cooperman, she was not prepared to hear it. Kasner told Cooperman that Bradley found her very, very abrasive. (T. 599, 602)
- Assistant Dean Cassandra Pierre expressed concerns similar to Dean Bradley's. She, being the second person responsible for managing behavioral issues, felt that Cooperman did not listen to her and dismissed her when she tried to raise her experience with the difficulties that students experience during transitions. (T. 600)

School. (T. 609-10)

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⁵ The ALJ incorrectly concluded that Dawes' complaints to Kasner about Cooperman had nothing whatsoever to do with the discharge of Cooperman. (ALJ p. 4 footnote 4) While it was not the precipitating factor in the decision (T. 102), Kasner discussed with Bernard the problems that Dawes and other managers had with Cooperman. (T.84-5, 103, 580, 609) In the conversation in which Kasner was asking for Barnard's authorization to terminate Cooperman, Kasner told Bernard that Cooperman had alienated everyone at the

- Clinical Supervisor David Osman testified that he found Cooperman to be extremely condescending. (T. 500) He told Kasner that he thought that Cooperman's attitude and her refusal to take direction from her supervisor would prevent teamwork among the administrators. (T. 70) Although Cooperman was a very new employee, she went to Kasner to tell her that she found Osman's manner of dress to be inappropriate. (T. 240) Cooperman conceded that she had a strained relationship with Osman (and this after less than three weeks on the job) that was unrelated to any issue involving the Union. (T. 238)
- Even the bookkeeper came to the conclusion in Cooperman's brief tenure that she was not fond of Cooperman. (T. 601)

Kasner related this feedback she was receiving to Cooperman, who said that she was "surprised" by her colleagues' reactions. (T. 602)

In addition, there was the ongoing dispute about departmentalization. As the Judge described in his Decision,

During the brief period that Cooperman worked at the school, she developed a plan to departmentalize the school's classes so that the children from the intermediate and high school grades would go from classroom to classroom and where the teachers would specialize in particular subjects. The evidence is that when Cooperman talked about this idea to Dr. Dawes, the latter was skeptical because of the special needs of the children, which might be disrupted by too much movement from class to class. There is also no doubt that Kasner, when presented with this idea, was also skeptical and was reluctant to implement it....[T]his was a matter of real dispute between Cooperman and Kasner.

As noted above, objections to Cooperman's departmentalization plans were shared not only by Dawes and Kasner, but by Bradley and Pierre. Even Board Chair Martha Bernard expressed concern to Cooperman about the speed of her proposed implementation of changes. Bernard asked Cooperman to put her departmentalization proposal in writing to the Board, but Cooperman never did. (T. 577, 585) Indeed, Cooperman testified that she felt that she could not wait to implement her plan for departmentalization and told that to Kasner. (T. 204-205, 214-215) Moreover, it is clear that Dr. Dawes told Kasner that she (Dawes) had concerns about Cooperman's plans. (T.206)

All of these problems were caused by an employee who had been at the school for less than three weeks.

Then, according to Kasner, Dr. Sandra Kahn, a management consultant assisting Lorge, Osman and Bradley, at a Leadership Team meeting on Friday July 28 or Monday July 31,6 Cooperman, knowing Kasner's objections to departmentalization, waited until Kasner temporarily left the room to solicit Kahn's opinion on her plans. (T. 69, 400-1, 511, 566) According to Kahn, Cooperman said, "You have to understand that changes need to be made. The State department came in and said that we need to implement changes. And, I'm here to do that. And I don't understand why people won't allow me to do that." (T. 566) Osman testified that Cooperman said, "I received a directive that I have to change the school. If the directive won't be followed, the school will be shut down." (T. 511) Uncomfortable by this attempt to bypass Kasner, Kahn asked Cooperman if she had discussed this with Kasner. Cooperman acknowledged that she had and that Kasner was opposed to it. Upon Kasner's return to the meeting, Kahn felt it necessary to inform Kasner what Cooperman had said. (T. 400, 567) Kasner said that they could not make these changes overnight. (T. 568) Cooperman did not deny the veracity of Kahn's testimony, but added that she felt that she was not being considered a team player

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⁶ There was considerable confusion about the meetings of July 28 and July 31—about whether there were in fact two meetings and if so, what was discussed at which meeting.

because she would not create a hostile work environment for Union representatives. (T. 201)

The last straw for Kasner was when she learned from Osman that Cooperman had gone to his office after the Leadership Team meeting and told him that she thought that Kasner was not fit for her job as Executive Director. (T. 70, 403, 505, 511, 607, 624-625) Kasner called Cooperman into her office the next day (either July 31 or August 1) and in Osman's presence, confronted her with what she had learned. Cooperman denied saying this (although she admitted during her testimony that she (inexplicably) went into Osman's office to tell him that Kasner was not certified as an administrator and that she disagreed with how Kasner conducted the Leadership Meeting (T. 195, 222)), but Kasner had no reason not to credit Osman and she told Cooperman this. (T. 72, 607)

At that same meeting, after Osman left, Kasner and Cooperman again discussed the issue of departmentalization. About a week earlier, when Kasner was still considering departmentalization, Kasner asked Cooperman to put her plans in writing, which Cooperman failed to do. (T. 197, 606)⁷ They continued to discuss departmentalization, however, over the next week. As Kasner heard more of other people's opposition to Cooperman's plans, she reached a point where she needed to make clear to Cooperman that her plan on departmentalization would not be implemented at the beginning of the upcoming school year in September, only one month away. (T. 606) Accordingly, she told Cooperman of this decision on July 31 and added that she would be willing to revisit the issue in January. (T. 606) Cooperman said, "I am very committed to this. Is there anything I can do to change your mind about this?" Kasner replied, "'No, I've made up

⁷ Martha Bernard had made a similar request of Cooperman on behalf of the Board. (T. 577, 585)

my mind." (T. 607) Cooperman then said, "It's the only way that I know how to supervise very inexperienced teachers. I cannot supervise each teacher in all of the subject areas. I can only see myself supervising one teacher as a science teacher, another teacher as a social studies, and math, and English, and so on. I cannot see myself supervising each teacher in each area." (T. 79, 606-607)

Cooperman's recollection of the meeting is similar to Kasner's in all significant aspects. According to Cooperman, when she was called into Kasner's office, Kasner called in Osman and then asked her, "Did you tell Mr. Osman that I'm incompetent?" to which Cooperman responded, "No...I may have made reference to the limitation on your time as an administrator, based upon the report, but I never called you incompetent." Then Kasner said, "I knew you would say that." Cooperman admitted that at that point Kasner was clearly angry with her (Cooperman) because of what Osman had related to her. (T. 221) Cooperman also confirms that Kasner told her that departmentalization would not be implemented in September, to which she admits she responded, "This is the way I need to supervise the children" and that it was the best way to supervise the teachers and make them most effective in the classroom. (T. 221, 251)

Kasner recalled Cooperman adding that if Kasner would not allow her to make the changes as she wished, Cooperman would contact the State Education Department and tell them that Kasner was preventing Cooperman from making the changes that they had requested. (T. 121, 607) While at the hearing Cooperman denied making this threat (T. 206), it is consistent with her repeatedly expressed view of the need to implement

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⁸ While Cooperman denied that she said some of what Osman related to Kasner, Cooperman significantly admitted that she told Osman that Cooperman was not certified and had no right to supervise the School beyond 25% of the time. (T. 221) Why would Cooperman have any reason to discuss Kasner's lack of certification and authority with Osman if she was not seeking to diminish the standing of Kasner, her supervisor, in the eyes of another supervisor?

departmentalization in order to comply with the State Report and save the school, even going so far as to attempt to bypass Kasner and discuss the matter with the Board Chair Martha Bernard.⁹ (T. 25, 577) Moreover, Cooperman admitted that she told Kasner that she (Cooperman) could not wait beyond September to make these changes and that she could not supervise the teachers without it. (T. 105, 204) Further evidence of the fact that Cooperman threatened to go over Kasner's head and report her to the State is the file memorandum of the conversation that Kasner made at that time that clearly supports her testimony on this point. (Resp. Exhibit 7)

While, in the words of Board Chair Martha Bernard, the previous administration would often "wait and wait" before dealing with problems (T. 580), as a new manager Kasner did not intend to avoid problems in order to avoid grievances. (T. 166, 172) Kasner had been keeping Bernard advised all along about the problems she was having with Cooperman moving ahead so quickly on changes at the school and about her attitude toward departmentalization. (T. 519) So after this final run in with Cooperman, Kasner immediately consulted Bernard and told Bernard that she did not see this relationship working out, that Cooperman had alienated everyone she came into contact with, including Kasner, and that the discussion she had had with Cooperman during her job interview, where she stated she felt she could work in partnership with Kasner, did not seem to be bearing out. Cooperman did not want to work in partnership--she wanted to be the person in charge. Kasner told Bernard that Cooperman even had stated to Kasner that she perceived Kasner's job to be the building manager, taking care of all the building-related issues while she did everything else. It was a struggle over who was in charge. It

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⁹ Bernard, who felt that Cooperman was acting inappropriately, told Cooperman to speak to Kasner about the matter. (T. 577-578)

was not just the fact of the departmentalization that concerned her, but Cooperman's statement that Kasner had no right to be the executive director, that she was not going to take direction from her, and that she would report to the State that the School was preventing her from implementing her ideas about departmentalization. (T. 84-85, 103, 579-81, 609-10)

Bernard responded that if that was how Kasner saw it, it would be better to end Cooperman's tenure immediately, and begin a new search, than to let this go on, and on, and on, and continue to be in a power struggle—[such] that the power struggle, itself, would take up all of the energy. (T. 610) So later that day Kasner called Cooperman into her office and told her she was fired. Cooperman testified, in a significant admission, that she believed that the discharge was "not about the school," but about Ms. Kasner's "reaction to [her] personally, and how she was dealing with [her] as a professional." (T. 254-5)

Astonishingly, according to the ALJ, the discharge of Cooperman was not caused predominantly by the above sequence of events, but rather by Cooperman's refusal to engage in an unfair labor practice, i.e. to assist in causing the resignation or constructive discharge of Chris Piccigallo and James Rouse because of their activities as union representatives. He bases this conclusion almost exclusively on the testimony of Cooperman herself.

Cooperman testified that at a meeting she had with Kasner on July 18, only eight days after Cooperman began at Lorge, Kasner called her into her office, Cooperman sat down and without preamble, Kasner said "I want you to make it difficult for James

[Rouse] and Chris [Piccigallo] to stay here." (T. 178) During her testimony, Cooperman first stated that in response she asked Kasner whether she wanted Cooperman to create a "hostile work environment," to which Kasner replied affirmatively. It quickly became clear at the hearing following a direction from the ALJ to describe the actual conversation and not her mental process, that in fact Kasner did <u>not</u> use this term. (T. 178-9) Cooperman conceded that she learned the term "hostile work environment" from her husband, a business manager and former chief information officer who had dealt with unions. (T. 229)

Cooperman testified that she refused to comply with Kasner's request to make it difficult for Rouse and Piccigallo to stay at the school, specifically telling Kasner at that meeting "I can't do that" and "I need to build relationships" and "It wouldn't sit right with the teaching staff." (T. 178, 179) According to Cooperman, Kasner responded to the effect that she "could see it happening all over again." (T. 180) Cooperman testified that she construed that to mean that Kasner assumed from her refusals that Cooperman would be soft on teachers. (T. 181) Thus, it was clear, according to Cooperman, that on July 18, she was on record with Kasner that she would refuse to make things difficult for Rouse and Piccigallo.

How did Kasner respond to this alleged challenge to her authority? According to Cooperman, Kasner did not threaten to take any action against Cooperman, but rather said that Cooperman would continue to work at Lorge and told Cooperman, "You are going to have to deal with these people. You might as well be informed. Here is the Union contract and I think that you ought to read it." (T. 180) She told Cooperman that Rouse was very manipulative and that she should not allow him to control her. (T. 169)

(Why would Kasner give Cooperman the contract and tell her how to deal with a difficult employee if she was planning on getting rid of Cooperman?)

There considerable the regarding was testimony in record the management/Leadership Team meeting(s) on July 28 or 31. According to Cooperman, the July 28 meeting began with a discussion of the distribution of Individual Educational Plans [IEPs] to the teaching staff. She recalled Osman becoming very angry about Piccigallo's complaint that he did not gave access to them. Kasner then described an earlier incident in which Rouse and Piccigallo walked out of a grievance meeting because they objected to the School's note taker and another incident when Piccigallo refused to permit a prospective student to observe his class. Cooperman said that she was uncomfortable "going after" these teachers since she wanted them to like her. Cooperman alleged that Cassandra Pierre said that "Chris and James" have caused a lot of problems at the school and they really have to go. (T. 186-190)

Cooperman testified that there was another meeting on August 1 where Kasner, Osman, Bradley, Pierre and Kahn were present. They began talking about class reviews. At one point, Kasner left the room go to the bathroom. Cooperman did not mention, as all the other participants in the meeting recalled as set forth below, that she (Cooperman) raised the issue of departmentalization with Dr. Kahn while Kasner was out of the room, knowing that Kasner had already expressed displeasure with the idea. Instead, she picked up the story at the point after Kasner returned, when according to Cooperman, Kasner noted Cooperman's refusal to take her input on Rouse and Piccigallo. Cooperman said that she was unwilling to create a hostile work environment for Rouse and Piccigallo. Cooperman also alleged that Kahn said that that was not what Kasner wanted but what

the Board of Trustees wanted, since Rouse and Piccigallo caused trouble for the School. T. 200-201,

The other witnesses, including three who were not discredited by the ALJ, gave a much different story. Consultant Dr. Sandra Kahn testified that she only attended one meeting with Cooperman. Accordingly to her, the meeting was to talk about the State report and things that needed to be changed in the School. At one point Kahn recalled that Kasner left the room and Cooperman said to Kahn, "I'd like to get your opinion of departmentalization." Kahn asked Cooperman if she had discussed it with Kasner and Cooperman said that she had, but that Kasner disagreed with her proposal. Kahn also said that she could not allow Cooperman to put her in a position where she (Kahn) would be forced to take sides. (T. 400) Kahn testified that she did not want to feel used. (T. 408) To avoid Kasner learning about conversations behind her back, Kahn immediately told Kasner on her return of Cooperman's attempt to solicit Kahn's opinion on a matter that Cooperman knew Kasner had already rejected. (T. 400-401)

Kahn testified that a few teachers were discussed at the meeting. One teacher, Ms. Edwards, was mentioned as a good teacher and a Mr. Blau as a weaker one. It was mentioned that Piccigallo yelled at the kids. (T. 401, 404) Accordingly to Kahn, Mr. Bradley stated that Rouse can be hard to work with and can be manipulative and as a teacher he needs to be watched and needs a lot of help. (T. 401) It was in this context, Kahn recalled, that Cooperman said that she did not want to say that Rouse was a bad teacher as she did not know him and didn't want to be put in the position of creating a hostile work environment until she got to know him. (T. 401-402) Kahn recalled saying that Cooperman should not misinterpret this, that she wasn't getting the point of going

over the teachers. The point was not to created a hostile work environment, but to try to tune her into who she would be working with. It has nothing to do with hostility, Kahn said. (T. 402)

According to the testimony of Dean Shawn Bradley, Cooperman said at the meeting that changes needed to be made in the instructional system and that Cooperman talked about splitting the classrooms. He also recalled that Cooperman expressed her opinion about departmentalization when Kasner stepped out of the room. He recalled Cooperman saying, "You have to understand that changes needed to be made. The State Department cam in and said that we need to implement changes. And, I am here to do that. And I don't understand why people won't let me do that." (T. 566) On Kasner's return, she said that any changes had to come slowly, as the student population at the School was not subject to rapid changes. (T. 562-563) Bradley felt that there was tension between Cooperman and Kasner at the meeting (T. 565), but he recalled no conversation about Rouse or Piccigallo or a hostile work environment. (T. 569)

David Osman, another participant in the meeting, testified that the discussion at the meeting was about making permanent assignments for specialties and then having the students move from room to room.¹⁰ He testified that Cooperman said that she had a directive from the Board to change the School and if the directive wasn't followed, if they did not follow her, the School would be shut down. (T. 511) Osman confirmed Kahn's recollection that Cooperman raised issues while Kasner was out of the room. He did not recall any discussion of Rouse or Piccigallo. (T. 511)

 $^{^{10}}$ This the concept that departmentalization that Cooperman wanted to implement in September.

Kasner also testified that there was discussion about departmentalization at the July 31 meeting. According to Kasner, when she returned from the bathroom, Cooperman said that Kasner was standing in the way of efforts to fix the school according to the State mandates. (T. 69)

Thus, every participant at the meetings, except Cooperman, testified that Cooperman had raised the issue of departmentalization while Kasner was out of the room, despite knowing that Kasner, her supervisor, had opposed the idea, and no one except Cooperman recalled any discussion of creating a hostile work environment for Rouse and Piccigallo. Cooperman did not deny that she raised the issue of departmentalization with Kahn while Kasner was out of the room.

It is clear from a careful review of Cooperman's testimony, compared to that of the other witnesses, that the ALJ's factual findings and the conclusions he drew from them were not supported by a preponderance of the record evidence.

<u>ARGUMENT</u>

A. The Administrative Law Judge misapplied Board law, specifically Wright Line, in finding that Cooperman was terminated in violation of the Act.

The Administrative Law Judge found that all of the people involved in this case were essentially well intentioned individuals who were trying to do a good job in difficult circumstances. (Decision p. 2 l. 43-44) According to the Decision,

there may have been a variety of factors that caused Kasner to discharge Cooperman, all relating to her belief that Cooperman would not take direction from her. The evidence shows that Kasner and Cooperman disagreed about a significant policy matter; namely the question of departmentalization. The evidence shows that Kasner might even have come to the opinion, (probably unjustified), that Cooperman was going behind her back and seeking to

undermine her authority. Moreover, the initial starting point of these two individuals was precarious because Cooperman had originally applied for the same job that Kasner had obtained. And human nature being what it is, I can understand why Kasner would be suspicious of Cooperman and view her as a potential rival. Finally, there was, it seems to me, a difference in attitude and approach given that Cooperman had an academic background and Kasner had a social work background.

The Judge continues, "There is no doubt that Kasner, when presented with {the idea of departmentalization, was also skeptical and was reluctant to implement it...[T]his was a matter of real dispute between Cooperman and Kasner." (Decision p. 4, 1. 39-43) The Judge credits Kasner's statement that "there was a progression from an agreement to work together, to a conflict, to a breakdown, to the point where Mrs. Cooperman made it clear that, for right or wrong, she was not going to take direction from me." (Decision p. 9 1. 32-35) The Decision also cites the testimony of custodian Edwin Blowe as corroborating Respondent's argument that there were other issues that were the subject of a non-union related dispute between Cooperman and Kasner and that led to her discharge. He testified that soon before Cooperman was fired, he overheard Kasner discussing with Bernard that fact that Cooperman didn't want to go by her rules and that she wanted to do a lot of things for the school that couldn't happen. Blowe testified, "Ms. Bernard, like I said, was agreeing with Ms. Kasner. And she was saying that 'We couldn't make all these changes. We didn't [have] the money to make all these changes." He also heard Kasner say that Cooperman wanted to bring the library up from the basement and that this would cost too much money. (T. 658)

The Judge also finds that Kasner interpreted Cooperman's conversation with Osman after the Leadership Team meeting on July 28 or July 31 as being an accusation

by Cooperman that Kasner was not competent to be the Executive Director. Kasner learned about this conversation only a day or two before Cooperman was fired.

There is additional significant undisputed evidence corroborating Respondent's position that Cooperman was terminated wholly or at least predominantly for factors other than her reluctance to engage in close supervision of Rouse and Piccigallo. As found by the Administrative Law Judge, 11 Kasner thought that Cooperman was going behind her back and seeking to undermine her authority. (Whether that belief was justified or not is irrelevant.) Cooperman's hostility towards Kasner is revealed in her letter to Trustee Howard Johnson in which she concedes that she was fired because of personal differences with Kasner. She asks Johnson "why [she] was invited to work for an individual whose personal goals are to perpetuate the divide between the clinicians and educators and whose stated mission is to transform Lorge into a day treatment center for emotionally disturbed children." (GC Exhibit 8) Finally, Martha Bernard, who was not discredited by the ALJ, testified that Kasner related to her Cooperman's assertion that she was given a directive by the Lorge Board to move ahead to change things in the school. (T. 579) Bernard was also told that Cooperman had alienated everyone she had come in contact with and that there was a power struggle relating to the dispute between Cooperman and Osman. (T. 579, 609) Bernard corroborated Kasner's testimony that Cooperman had threatened to go to the State Education Department and tell them that the School was not willing to carry out the changed that Cooperman wanted to make and which she believed were the only way to run the instructional program. (T. 580) Kasner never conveyed to Bernard any desire to create a "hostile work environment" for Rouse and Piccigallo. (T. 580, 581)

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¹¹ ALJ page 6, lines 27-30

So, according to the Judge's findings and undisputed testimony, the following were all factors that contributed to the decision to discharge Cooperman:

- Kasner and Cooperman disagreed about a significant policy matter-namely the question of departmentalization. This was a matter of real dispute between them. Kasner was skeptical of the idea and reluctant to implement it, but Cooperman persevered.
- Kasner believed that Cooperman had made it clear that she was not going to take direction from her.
- Kasner thought that Cooperman was going behind her back and seeking to undermine her authority.
- Kasner was suspicious of Cooperman from the beginning and viewed her as a potential rival given that Cooperman had originally applied for the same job that Kasner had obtained.
- There was a difference in attitude and approach between Cooperman and her supervisor given that Cooperman had an academic background and Kasner had a social work background.
- Cooperman didn't want to go by Kasner's rules and she wanted to do a lot
 of things for the school that couldn't happen because the School didn't have the money
- Cooperman wanted to bring the library up from the basement and this would cost too much money.
- Kasner learned only a day or two before Cooperman was fired that Cooperman had told another supervisor that Kasner was not competent to be the Executive Director.

- Cooperman believed that she was fired because of personal differences with Kasner, who she believed to be an individual whose personal goals are to perpetuate the divide between the clinicians and educators and whose stated mission is to transform Lorge into a day treatment center for emotionally disturbed children.
- After only a few weeks, all of the Lorge supervisory team found Cooperman to be very problematic as a person and/or as an instructional supervisor—inter alia, arrogant, hostile, abrasive, insulting, condescending, critical, sarcastic, argumentative, self-righteous, overbearing, divisive, unreceptive to feedback or criticism, harsh, dismissive and a proponent of an instructional program with which they all disagreed.

Despite <u>all</u> of these lawful causes for Cooperman's termination, the ALJ found, "notwithstanding the above, I cannot escape the conclusion that the proximate and predominant reason for Kasner's decision to discharge Cooperman was the latter's unwillingness to make life difficult for and force the resignations of the two union delegates, Rouse and Piccigallo" and that therefore Respondent's discharge of Cooperman violated the Act.

This conclusion is invalid for many reasons. First, the Judge applies the wrong standard. Under *Wright Line*,¹² even if the General Counsel were able to establish that Cooperman was told to create a hostile work environment for Rouse and Piccigallo, and even if she was told to do so to force them to quit, and even if it could be established that the Employer was motivated by the employees' protected, rather than their unprotected, activities, unless the General Counsel can meet his burden of proving that the Charging Party would have been fired anyway for non-discriminatory reasons, no violation has

¹² 251 NLRB 1083 (1980) enfd. 662 F.2d 899 (CA 1 1981) cert. den. 455 U.S. 989 (1982)

been established. Without analysis or citation, the Judge finds in a conclusory manner that "Respondent has not shown that it would have discharged Cooperman for reasons other than her refusal to commit an unfair labor practice."

On what basis could the Judge possibly conclude that the General Counsel had met his burden of proving that the School would not otherwise have fired an employee who, in the course of just three weeks, alienated everyone at the school, insisted on a rushed and radical change of programming that was objected to by the rest of the management team, went behind her supervisor's back to lobby for her own position, told a colleague that she thought her supervisor was incompetent and then threatened to report her supervisor to the State, an action that could have imperiled the existence of the school? How could the School have done otherwise?

Further, the Judge erred in finding that the "proximate and predominant" reason for the discharge was Cooperman's unwillingness to make life difficult for Rouse and Piccigallo. It is difficult to talk about proximity when the entire drama unfolded over a period of only three weeks. Everything was proximate. If anything, the timing supports Respondent's position. Even under Cooperman's version of events, Kasner knew as of July 18 that Cooperman was unwilling to engage in the close supervision of the two teachers that Kasner had requested. Yet it was not until two weeks later, the day after she found out that Cooperman had gone to Osman, another manager under Kasner's supervision, to complain about, criticize and undermine her, that Kasner made the final decision to terminate Cooperman, a decision she effected the following day.

Moreover, if the "proximate" cause of Cooperman's discharge was her refusal to create a hostile work environment for Rouse and Piccigallo, as the Judge states, surely there would be <u>some</u> evidence that Kasner took other action to implement this nefarious scheme. Instead, absolutely nothing adverse happened to either Rouse or Piccigallo. They continued to work at the School and to receive good appraisals for their classroom work and no other supervisor either before, or after, Cooperman was instructed to retaliate against them. Clearly, the only "proximate" event to Cooperman's discharge was the fast approaching new school year in which Cooperman was insisting that major pedagogical changes needed to be made in order for her to properly supervise the staff. As the ALJ properly noted, whether she was correct or not in her pedagogical view is not the issue. The changes, much to Cooperman's dismay, were not hers to make.

In support of his conclusion that the improper reason was the proximate and predominant reason, the Judge cites four incidents. The first was Kasner's expression of her desire to be a strong manager, to supervise the school as she thought necessary without being intimidated by the possibility of grievances being filed. It is certainly not evidence of anti-union animus or illegal animus toward Rouse and Piccigallo for Kasner, as a new Executive Director faced with a critical State evaluation, to assert the need to be less "soft on teachers" (T. 166, 172, 181) and to refuse to let the teachers control the school, even if grievances would result. In fact, that is what a manager should do.

The second was Kasner's initial discomfort with Rouse's request that she turn over the names, telephone numbers, addresses and email addresses of people who had been hired, but had not yet begun work. Rouse asked Kasner for the names "a week or two" before July 27, but she said she was not comfortable giving him this information because the employees were new. (T. 288) However, she turned the names over on July 27, just a week or so after the initial request. This sequence of events can hardly be

interpreted as anti-union animus. This is particularly true in light of Rouse's testimony that just a week before this, he had asked Kasner to send out to all bargaining unit members, including the new hires, a letter he had written to inform them about the State Education Department certification requirements. Kasner distributed it as Rouse had requested. (T. 277)

The third factor relied upon by the Judge in support of his conclusion that Cooperman's refusal to try to get Rouse and Piccigallo to leave was the predominant reason for Kasner's decision to discharge Cooperman was a comment allegedly made by Cassandra Pierre, who was not alleged or proven to be a supervisor or agent of the School and who had no input into the decision to fire Cooperman. This comment about the need to get rid of Rouse and Piccigallo was not corroborated by anyone else at the meeting at which it was allegedly made. In fact, all the other participants at the meeting—Kasner, Kahn, Osman and Bradley (the latter three of whom were not discredited by the ALJ)—said that Pierre was not even there. ¹³ Kasner testified that Pierre was on vacation at the time. (T. 71)

Finally, the Judge credited the testimony of Edwin Blowe, a janitor who had recently been suspended by the School for poor work, about a conversation between Bernard and Kasner, which he overheard. Interestingly, Blowe testified that the first thing he heard Kasner saying was that Cooperman didn't want to go by her rules and that she wanted to do a lot of things for the school that couldn't happen. Blowe testified,

Ms. Bernard, like I said, was agreeing with Ms. Kasner. And she was saying that "We couldn't make all these changes. We didn't [have] the money to make all

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¹³ Osman said that either Bradley or Pierre was at the meeting., in addition to himself, Kasner, Cooperman and Kahn. (T. 509) Bradley certainly was there, so Pierre was not. Bradley remembered only Kasner, Cooperman, Kahn and Osman being there, in addition to himself. (T. 566) Kahn said she remembered Kasner, Cooperman, Bradley and Osman, but she wasn't sure about Pierrre. (T. 398)

these changes." Ms. Cooperman wanted to bring the library up from the basement where the kids weren't allowed no more to upstairs. That kind of was a good idea. It was a lot of work, but it would have made a difference. And she was saying that "Yeah, we would have to spend too much money to do this. We would have to -- the way Ms. Cooperman wanted to change the school around." And Martha Bernard was saying that we are going to spend too much money. It's too much hassle. It's too much of a headache to do the things like that.

Then (after some leading, as noted by the ALJ (Decision p. 6 l. 48 – p. 7 l. 1)) Blowe testified that Kasner said that she "wanted to get rid of her headaches. Her headaches were Mr. Rouse and Piccigallo." Blowe's testimony establishes that Kasner said that Cooperman was discharged for not going by her rules and for her unreasonable plans for the school. She did not say that Cooperman was fired because she wouldn't get rid of Rouse and Piccigallo or that Kasner wanted to get rid of Rouse and Piccigallo because of their Union activity.

Based on these incidents, the Judge incomprehensibly finds that the improper motivation was the predominant reason for Cooperman's termination.¹⁴

B. The Judge erred in relying on evidence that was improperly admitted into the record.

During the hearing, it was revealed that Rouse, with Piccigallo's knowledge, had engaged in the surreptitious taping of numerous labor-management meetings as well as meetings he had with his own supervisors. Despite an objection from the counsel for the Respondent, supported by citation of Board law (T. 646), the Judge admitted the transcripts of the tapes. In his decision, the Judge quotes extensively from the transcript of one of the secretly taped meetings. Then he states, "I overruled [the Respondent's]

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¹⁴ Indeed even Cooperman testified that the reason for her discharge was not about the changes in the School, but more about her failure to get along with Kasner as a professional. (T. 254-255)

objection [to introduction of the tapes], assuming that if the recordings were not doctored, they would constitute the most reliable means of ascertaining what took place at those meetings. I later discovered that the Board, as a matter of policy, precludes the introduction of secret recordings made at negotiation sessions. *Triple A Fire Protection*, 315 NLRB 409, 411 (1994). Nevertheless having taken them in as exhibits and having read the transcripts, it is impossible to close that door after it was opened. I can't order myself to disremember the evidence that was received." (ALJ p. 8 line 48)

Because the ALJ by his own admission relied on testimony that should not have been admitted into evidence and because it is impossible to determine how much weight he gave to this testimony, his decision must be reversed. In the event the Board does not grant the Respondent's Exceptions and dismiss the Complaint, the case should be remanded to a new ALJ to reevaluate credibility of the witnesses without consideration of improperly admitted testimony.

C. The Judge erred in relying on evidence of events that took place long after Cooperman was terminated.

The Judge cited a number of incidents in support of his apparent conclusion that there was anti-union animus that motivated Kasner's termination of Cooperman. A cited incident of September 2006 where Osman had argued with Rouse involved Osman, not Kasner, and Osman had no input into the decision to terminate Cooperman. Further, the evidence shows that during the incident in question, Osman, angry about an accusation from Rouse that he had done something illegal, tossed the collective bargaining agreement on the table toward Rouse and it slid off the table and landed on Rouse.

Kasner admonished Osman at the time of the meeting (T. 299) and later "verbally corrected" him for his action. (T. 77) In addition, Kasner sent a memo to Osman and Rouse following the meeting in which she said she regretted that the level of anger had disrupted the meeting and asked to reschedule the meeting. (GC Ex. 5) This memo is inconsistent with the Judge's finding that Kasner exhibited anti-union animus in this instance.

The other incidents cited by the Judge were more than nine months after Cooperman was terminated. Two of the three incidents involved supervisors with no input into the termination decision. Only one involved Kasner in which she became angry with Rouse and Piccigallo over what she perceived as their obstruction of her attempts to cover classes with temporary workers. As the ALJ noted, however, "[A]ny time that there is involved any kind of negotiation about contracts or grievances, I assume that both sides deal with them aggressively, as they are required to do. That's what their jobs are. That does not necessarily prove animus." (T. 93)(emphasis added)

D. The Judge erred in crediting Cooperman even when her testimony was contradicted by many other witnesses and documentary evidence.

The Judge credited Cooperman's account of events over that of other witnesses only "to the extent that there were crucial differences between Cooperman and Kasner." Even allowing for the Judge's discretion in reaching such a conclusion as to uncorroborated testimony by Kasner as to her one-on-one conversations with Cooperman, there are many conversations about which Cooperman's testimony is

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¹⁵ One has to question Judge Green's skepticism about Kasner's testimony as he asserted during her testimony that it was "the job of the General Counsel to browbeat witnesses." (T. 34)

contradicted by two or three witnesses in addition to Kasner and/or by documentary evidence.

The Judge incorrectly found that Cooperman's testimony was corroborated by other witnesses. While her testimony was repeatedly contradicted by (in addition to Kasner) Dawes, Bradley, Osman, Bernard, and Kahn, none of whom was discredited by the ALJ, as well as the file memo prepared by Kasner immediately after the July 31 or August 1 meeting with Cooperman, Cooperman's testimony about the critical meetings and conversations was corroborated by no other witness. Even her allegation and the General Counsel's theory that she was fired for her refusal to closely supervise Rouse and Piccigallo were arguably corroborated only by one ambiguous sentence in the testimony from the custodian Edwin Blowe that Kasner said that she "wanted to get rid of her headaches. Her headaches were Mr. Rouse and Piccigallo." And even this alleged statement is consistent with Kasner's undisputed assertion that she had problems with Rouse and Piccigallo for many reasons unrelated to their union status. (See below.)

Thus the ALJ's statement that Cooperman's testimony was corroborated by other witnesses was incorrect. While credibility determinations are generally within the discretion of the trier of fact, given that the Judge here made that determination based on an incorrect reading of the record, it must be reversed.

E. Even crediting Cooperman's allegation that Kasner asked her to make it difficult for Rouse and Piccigallo to stay at the School, the Judge erred in concluding that it was their protected activity that upset Kasner.

Even assuming arguendo that Kasner may have expressed the desire to have Rouse and Piccigallo leave the School, there is extensive evidence in the record that much of their activity that displeased her was completely unrelated to their Union activities or was not protected by Section 7.

- For example, in 2004 an arbitrator found that Rouse inappropriately grabbed the hands of a supervisor after she got up to leave a union management meeting because of a comment that Rouse made that she believed was racially insulting. (Respondent Exhibit 3, T. 330-332)
- Rouse's history of expressing insulting remarks was not limited to those found by the Arbitrator. Rouse called Kasner a "fucking bitch" and "garbage." (T. 699) It was for this reason that Kasner told Cooperman that she would be pleased if Rouse left the School since he insulted her regularly. (T. 699)
- Rouse slammed the door in Kasner's face and went so far as to say, when
 Kasner walked into a room that Rouse was in, "Something smells. I have to leave." (T.
- Rouse and Piccigallo engaged in surreptitious tape recordings of Union-Management meetings, activity arguably violative of Section 8(b)(3). While management only learned of the taping at the ULP hearing in this case, the activity demonstrates the ends Rouse and Piccigallo went to in an effort to "set up" management for litigation rather than to sincerely try to resolve matters between them. (ALJ page 8 footnote 10)
- Rouse falsely told teaching assistant Conchetta Diaz that she would be fired at the end of the year if she did not receive a State teaching certification, bringing her to tears. Kasner told Cooperman that she was angry that Rouse had called Diaz and

upset her and said that is wasn't his job to do—"he wants to be an administrator." (T. 170, 174, 284-290)

- Kasner told Cooperman that she had concerns about Rouse because he had interviewed for both their jobs—he wanted their jobs and he sometimes acted outside his authority. (T. 90, 175, 168)
- Kasner told Osman that Rouse was problematic because "he does what he
 wants, he goes from floor to floor and room to room and he doesn't attend to the
 children." (T. 528)
- Kasner, on several occasions prior to assuming the Executive Director position, observed Rouse's classroom and saw that there was little teaching going on. Indeed she observed Rouse frequently sitting in the dark with the students doing nothing. Kasner told this to Cooperman to ensure that Rouse was delivering the instruction he was writing in his lesson plans. (T. 595)
- Cooperman testified about an incident where Rouse had come to her asking that she reevaluate a lesson that Piccigallo had given of which Cooperman had been critical. When she reported this to Kasner, Kasner told her that Cooperman had a right to evaluate Piccigallo any way she saw fit—that Rouse was trying to manipulate her, to manage her, and that he wanted to be an administrator. (T. 184)
- In 2006, Rouse filed a criminal complaint against Osman because a copy of the collective bargaining agreement that Osman tossed to Rouse across the desk landed on Rouse's lap. The case was dropped by the police without investigation. (T. 552-553)

- Rouse refused to sit in a circle of teachers at staff meetings because of his alleged anxiety in such group situations--hardly activity protected by Section 7. (T. 368-370)
- Rouse repeatedly expressed the view that the Union was being undermined because management merely distributed copies of the grievances the Union filed. He called that anti-union harassment. (T. 371, 448)
- Rouse and Piccigallo walked out of a union management meeting merely because they did not like the management note taker. (T. 196)
- Rouse believed he was being harassed in violation of Section 7 because a learning disabled child called him gay and the School did retaliate against the child as he desired. (T. 708-795)
- Rouse continued to carry a grudge that the School did not immediately hire his friend based on his recommendation, even though the friend was eventually hired. (T. 272)
- Rouse believed that his job was to implement the State Report on the management of the School. (T. 34)
- Rouse believed he was being harassed because he did not receive an interview or acknowledgment of his application to be Executive Director of the School.
 (T. 348-349)
- Rouse received a verbal warning because he failed to attend mandatory training prior to the 2006-2007 school year. (T. 320-325)

- Rouse believed he was being harassed merely because he was asked if he was smoking outside the building during his prep period. (T. 342-343) He viewed mere inquiries into the veracity of these incidents as harassment. (T. 34-45, 244, 523-534)
- Piccigallo was also far from an ideal teacher. Indeed, even Cooperman
 was critical of his teaching. (T. 334-335)
- A number of supervisors, including Cooperman, noted that Piccigallo did not use an appropriate tone in speaking to students and had hurt feelings merely from being approached about that. (T. 230-233, 402-403, 529, 597)
- Piccigallo, a teacher of nine years at Lorge, feigned lack of knowledge on how to access Individual Performance Plans for students, in an attempt to impose that obligation on management. As he well knew, the plans were in the front office and easily available to all teachers. (T. 63-69, 220, 501-503)
 - Piccigallo refused to allow a prospective student into his class. (T. 189-90)
- Piccigallo believed he was being harassed merely because he was asked about files that were deleted on a computer in the room where he and Rouse ate lunch regularly. (T. 391)

It is clear based on the above that many of the problems in the management/union relationship at the School were based on activity by Rouse and Piccigallo that were not protected by Section 7. Much of the School's displeasure with Rouse and Piccigallo related to their resistance to any attempt to supervise their work. The fact that prior management responded to this reaction by not confronting them, surely could lead a newly appointed Executive Director to the conclusion that such passivity may have

contributed to a poor evaluation from the State Education Department and that some more assertive management was necessary. Assertive strong management to remedy educational deficiencies is not to be condemned as anti-union animus, but recognized as a reasonable and commendable attempt by management to respond to significant problems.

Even assuming therefore that Kasner wanted to rid the School of such problems, such a motive would be quite reasonable and not violative of the Act. Thus, even if Cooperman is credited that Kasner expressed the desire to make it difficult for Rouse and Piccigallo to stay at the School, unless the General Counsel can establish that it was their protected, rather than their unprotected, activity that was motivating Kasner, no violation has been established. Since it is the General Counsel's burden to prove such motive by a preponderance of the evidence, such burden has not been met here in light of Rouse's and Piccigallo's blatant acts of disrespect and expressed hostility to management and its exercise of legitimate supervisory functions regarding their performance. There is, in fact, no evidence that Kasner was motivated against them for their protected activity and much evidence that Kasner sought to work out reasonable solutions to problems that they raised as Union officers.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that the Board grant the Exceptions and dismiss the Complaint. In the alternative, if the Complaint is not dismissed, the Respondent respectfully requests that the Board remand the case to the Administrative Law Judges Division for an evaluation of the record without consideration of the improperly admitted testimony. Because Administrative Law Judge

Green has expressed his inability to disregard the improperly admitted testimony, it is requested that in such event the matter be assigned to a different Administrative Law Judge.

Respectfully submitted,

Counsel for Respondent